United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

Signed

74-1119

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

AVIS RENT A CAR SYSTEM, INC.,

Plaintiff-Appellee

v.

UNITED STATES OF AMERICA,

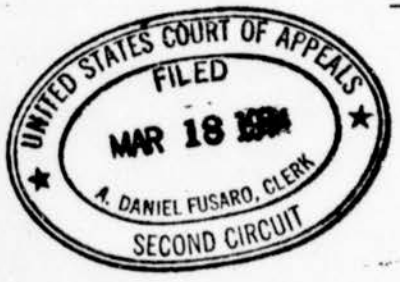
Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE

UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT



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BRIEF FOR THE APPELLANT

STATEMENT OF THE QUESTION PRESENTED

Whether the District Court erred in deciding that, for the purpose of applying the federal employment tax provisions of the Internal Revenue Code, "car shuttlers" engaged by taxpayer[1/] to move rental vehicles among its various car rental locations were independent contractors rather than employees of the taxpayer.

1/ References to taxpayer are to plaintiff-appellee Avis Rent A Car System, Inc.

STATEMENT OF THE CASE

This appeal involves the liability of Avis Rent A Car System, Inc., for federal employment taxes. The total liability involved is $311,784.17, plus accrued interest, for all four quarters of 1962, 1963, 1964, 1965, and 1966. (V-R. 888.)[2/] The findings and fact, conclusions of law, and opinion (V-R. 885-907) of the United States District Court for the Eastern District of New York (the Honorable Anthony J. Travia), filed on September 27, 1973 (I-R. 4), are reported at 364 F. Supp. 605. Judgment was entered in taxpayer's favor on October 3, 1973. (V-R. 908.) Notice of appeal (V-R. 909) was timely filed by the Government on October 29, 1973. (I-R. 4.) Jurisdiction is conferred upon this Court by 28 U.S.C., Section 1291.

The underlying facts of this case, as found by the District Court (V-R. 901-912), and otherwise reflected on the record, are substantially undisputed and may be summarized as follows:

Taxpayer is in the business of renting cars to the general public. (I-R. 894.) An integral aspect of this business is the one-way rental whereby a customer may rent a car at point A and return the car to taxpayer at point B. (V-R. 782.) Points A and B might both be located within one city (II-R. 232) or might be separated by a distance of several hundred miles (II-R. 315). Such one-way rentals create a constant imbalance in the distribution of taxpayer's rental cars among its various

2/ "I-R." through "V-R." references are to the five separately bound volumes of the record appendix.

rental locations. (V-R. 894.) Correcting this imbalance requires an operation known as "car shuttling," which is simply the driving of the cars between the various rental stations in such numbers as to meet anticipated demand. (V-R. 895.)

To perform this shuttling operation taxpayer usually engages the services of drivers, called "car shuttlers," who are not in its regular employ. (V-R. 895.) However, taxpayer's regular employees, such as its rental and service agents or supervisory personnel, sometimes perform this function either in the course of their regular employment or after hours. (I-R. 123, 164.) The dispute in this case is over the status of these car shuttlers (including regular employees working after hours) for purposes of federal employment taxes--i.e., whether they are employees of taxpayer or independent contractors.

The services of shuttlers were procured in a variety of ways. At some locations certain key individuals (referred to by the court below as "head shuttlers" (V-R. 905-906)) were contacted, who in turn contacted others (II-R. 352, III-R. 414, IV-R. 716). In at least one city shuttlers were hired through a union hiring hall. (I-R. 125.) Drivers might also be gathered from the street (I-R. 176) or other odd locations (II-R. 233). People would simply walk up to the Avis rental counter to inquire into the possibility of shuttling. (II-R. 314.) A common practice at airport locations was to use airline personnel, who could get flight passes, for intercity shuttling. (IV-R. 608.) In some areas, especially at

airports, taxpayer's need for car shuttlers was common knowledge among those employed in the vicinity, who would inquire from time to time about shuttling. (IV-R. 580.) Some locations had a reservoir of such individuals and would solicit them when the need arose. (I-R. 144.) Of course, taxpayer's regular employees would know through the course of their employment about the need for shuttlers. (II-R. 298.)

Once it was determined that a particular shuttler was to be engaged to move a particular car, a Vehicle Transfer Contract (VTC) (V-R. 835) would be filled out. The VTC was a standard form used by all Avis locations and had to be filled out every time a car was shuttled. 3/ (V-R. 801, 895.) It contained the following language:

> Contractor acknowledges that he received the vehicle below from Owner or Owner's Authorized Representative in good appearance and safe mechanical condition, and agrees to deliver it at the time and place and for the fee designated below, in the same condition as received, ordinary wear and tear excepted. Contractor agrees not to use said vehicle for any purpose other than for delivery as described herein, nor to transport any persons or property therein.
>
> It is agreed that this contract in no way constitutes the contractor as an agent or employee of the owner of said vehicle or of Avis Rent-a-Car System, its members or licensor or licensor's subsidiaries. (V-R. 835.)

3/ Regular employees shuttling "on the clock" would not use a VTC, but would instead use a "non-revenue ticket." (II-R. 236.)

Also included on the VTC were spaces for information identifying the car to be moved, the sending and receiving rental stations, the date, time, and mileage both out and in, the amount of compensation, and the signatures of the shuttler and taxpayer's agent authorizing the dispatch of the car. (V-R. 835.)

Each shuttler's driver's license would be checked, usually each time he drove. (II-R. 354, V-R. 901.) However, those shuttlers who became known to taxpayer's regular employees would often not have their licenses checked every time. (II-R. 237.) The shuttler's driving record was generally not ascertained. (II-R. 353-354.) The amount of compensation would also be agreed upon--generally a flat rate per trip for local moves and on a mileage basis for more distant moves. (V-R. 895, IV-R. 581.) These fees were not negotiated but were set by taxpayer and submitted to a potential shuttler on a "take it or leave it" basis. (V-R. 302.)

The shuttler then drove the car to its prescribed destination. Or, if the car to be moved was at a distant point and to be returned, the shuttler would travel to the car and return it. (IV-R. 584, 598.) Taxpayer usually paid for or provided transportation for that half of the trip which did not involve the actual shuttling of the car. (III-R. 523.) If several cars were to be moved, usually within one locality, a group of shuttlers would drive some of the cars to their destination and be returned by a "chase car" to drive the next batch of cars. (II-R. 239.)

The chase car would be provided by taxpayer and its driver was sometimes paid more since he had to drive in both directions. (I-R. 80.)

The shuttlers were given no directions as to the route that they should take or the time they were to deliver the car (II-R. 324-325), although it was generally understood that they were to be delivered as expeditiously as possible (IV-R. 640). When several cars were being moved, however, they would usually be driven in a group. (IV-R. 639.) Generally there were no other instructions given although occasionally some specific instructions were given as to procedure in the event of an accident or breakdown. (I-R. 148.)

Upon arrival at the receiving station the shuttler would check the mileage on his car's odometer and report to taxpayer's rental desk with his copy of the VTC. (IV-R. 638.) He would then be paid the agreed fee and be reimbursed for any expenses, such as gas, oil, or tolls. (V-R. 817-818.)[4/] Payment was usually in cash (II-R. 239, 321), although occasionally it would be by check (III-R. 446). At this time a petty cash slip was made out, setting forth the amount of compensation and reimbursement for expenses, if any, and signed by the shuttler. (II-R. 321.) A petty cash account number was also put on the slip to show that the payment was for car shuttling. (I-R. 81.)

4/ If more than one trip was to be made, payment might be delayed until all trips that day were completed. (II-R. 239.)

Unlike taxpayer's regular employees, car shuttlers did not fill out an employment application, take an employment examination, or submit to an employment interview. (V-R. 793-795.) Also unlike some regular employees they did not wear distinctive uniforms. (V-R. 795-796.) They also did not participate in taxpayer's regular employee benefit program (V-R. 796-797, 811-812), although some shuttlers were under the impression that they were covered by some form of insurance while actually driving one of taxpayer's cars (III-R. 525, 556-557). Car shuttlers could, and sometimes did, offer their services to other car rental companies. (V-R. 806-807.)

Taxpayer did not withhold or pay federal employment taxes with respect to the compensation paid to car shuttlers. (V-R. 888.) Upon audit, the Commissioner of Internal Revenue determined that all of the above-described car shuttlers were employees of taxpayer for purposes of the Federal Insurance Contributions Act (Internal Revenue Code of 1954, Sec. 3101 et seq.), the Federal Unemployment Tax Act (Sec. 3301 et seq.), and the Collection of Income Tax at Source on Wages Provisions (Sec. 3401 et seq.) (V-R. 888.) On the basis of that determination, the Commissioner assessed deficiencies against taxpayer in the total amount of $311,784.17. (V-R. 888.) Taxpayer paid the sum of $31,178.42 with respect to such assessment and filed a claim for refund for such amount and for an abatement of the balance of the assessment. (V-R. 888.) Upon denial of

such claim taxpayer initiated the instant suit in the court below to recover the amount paid. (I-R. 5.) The Government counterclaimed for the balance of the assessment. (I-R. 9.)

The case went to trial without a jury (V-R. 887), with the evidence consisting of the testimony of one of taxpayer's employees, some thirty-seven depositions, and several exhibits[5/] (V-R. 889). The District Court concluded that the car shuttlers were not taxpayer's employees but were independent contractors for purposes of federal employment tax purposes. (V-R. 907.) Consequently, the court granted taxpayer's prayer for relief while denying the Government's counterclaim.(V-R. 908.) The Government brings this appeal. (V-R. 909.)

5/ The entire amount of evidence has been included in the record appendix on the request of plaintiff-appellee.

SUMMARY OF ARGUMENT

Taxpayer's liability for federal employment taxes--i.e., FICA taxes, FUTA taxes and federal income tax withholding--with respect to payments made as compensation for services performed by the car shuttlers involved in this case turns on whether such suttlers are employees of taxpayer or independent contractors. The pertinent statutory and regulatory provisions direct that such status shall be determined in accordance with the usual common law rules.

In United States v. Silk, 331 U.S. 704 (1947), the Supreme Court applied such common law rules to certain coal unloaders and found them to be employees. Accordingly, it reversed the decisions to the contrary of the two lower courts. The facts of the Silk case, insofar as the Court found them to be factors in determining the employer-employee relationship, are substantially identical to the facts of this case. In both cases, the work performed by the individuals concerned was an integral part of the respective taxpayer's business. Indeed, here, the work was the same as that performed by taxpayer's regular employees in many instances--the individuals whose status is here in question being engaged to perform the essential car shuttling operation during peak periods when the regular employees could not adequately deal with the problem. As in Silk, the services in question were performed on a job by job basis, and many of these individuals did not provide their services to the taxpayer on any kind of regular basis. As in Silk, they worked only when they pleased and were free to

work for others. But the Court in Silk found such factors to be insignificant. What was significant, according to the Court there, was the fact that they did work in the course of taxpayer's trade or business, they provided only simple tools, they had no opportunity for profit or loss except from their own labor, and the taxpayer was in a position to exercise what little supervision was necessary for the performance of the tasks involved.

In the instant case, the car shuttlers share virtually all of the characteristics of the coal unloaders involved in Silk, and, conversely, virtually none of the characteristics of certain other individuals there found to be independent contractors--i.e., owner-drivers who, as "small businessmen," owned their own trucks, hired their own helpers, exercised responsibility for their own investment and management, and undertook the risk of loss as well as the opportunity for profit. Indeed, as to the most crucial factor of control, the court below found no support for taxpayer's contention that these individuals were not employees. Nevertheless, the court went on to conclude that these individuals should be classified as independent contractors, largely on the basis of factors rejected as insiginficant in Silk. Silk cannot be meaningfully distinguished from this case, and the lower court's application of the statute thus simply cannot be squared with the Supreme Court's controlling decision there. We submit, then, that the District Court's

conclusion that the car shuttlers here involved should be classified as independent contractors for the purpose of the federal employment tax provisions is erroneous as a matter of law, and that its judgment should therefore be reversed.

ARGUMENT

THE RECORD ESTABLISHES THAT THE CAR SHUTTLERS INVOLVED IN THIS CASE WERE TAXPAYER'S EMPLOYEES AS A MATTER OF LAW

The Federal Insurance Contributions Act (FICA) (Internal Revenue Code of 1954 (Sec. 3101 et seq.) imposes an income tax on wages received by individuals with respect to employment (Sec. 3101, Appendix, infra) and an excise tax on employers, with respect to having individuals in their employ, based upon the wages paid with respect to such employment (Sec. 3111, Appendix, infra). In addition to paying the excise tax imposed, employers are required to collect the taxes imposed upon their employees by withholding the amount of the tax from their wages as and when paid. Sec. 3102, Appendix, infra. These taxes are commonly known as Social Security taxes.

The Federal Unemployment Tax Act (FUTA) (Sec. 3301 et seq.) also imposes an excise tax on employers, with respect to having individuals in their employ, based upon the wages with respect to such employment (Sec. 3301, Appendix, infra). The Collection of Income Tax at Source on Wages ("Withholding") provisions (Sec. 3401 et seq.) require every employer making payments of wages to deduct and withhold federal income taxes from such wages in accordance with the applicable withholding tables (Sec. 3402(a), Appendix, infra). Collectively, FICA, FUTA, and income tax withholding are known and referred to herein as federal employment taxes.

The taxes imposed in each instance are based upon wages. For FICA and FUTA, "wages" are defined as "all remuneration for employment." Secs. 3121(a) and 3306(b), Appendix, infra, respectively. "Employment" is defined as "any service, of whatever nature, performed * * * by an employee for the person employing him." Secs. 3121(b) and 3306(c), Appendix, infra, respectively. Under the income tax withholding provisions, "wages" are defined simply as "all remuneration * * * for services performed by an employee for his employer." Sec. 3401(a), Appendix, infra. The FICA provisions define the term "employee" to include "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee * * *." Sec. 3121(d)(2), Appendix, infra. The FUTA provisions likewise define "employee" in accordance with the usual common law rules, although worded in a negative manner, excluding from the scope of the term those persons who have the status, under such rules, of an independent contractor. Sec. 3306(i), Appendix, infra. Finally, although the income tax withholding provisions do not specifically define "employee" in terms of the usual common law rules (see Section 3401(c), Appendix, infra), the Regulations promulgated thereunder do establish those rules for determining such status. Treasury Regulations on Employment Taxes (1954 Code), § 31.3401(c)-1, Appendix, infra.

Under FICA, Regulations Section 31.3121(d)-1(c), Appendix, infra, states the common law test for determining employee status as follows:

> (c) Common law employees. (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.
>
> (2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.
>
> (3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

The Regulations under FUTA and withholding substantially repeat the above language and add the following (Regulations §§ 31.3306(i)-1(d) and 31.3401(c)-1(e), Appendix, infra, respectively):

> If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

The position of the Government here is that the court below misapplied the controlling legal principles to the essentially undisputed facts of this case, and that its ultimate conclusion that the car shuttlers here involved should be classified as independent contractors for the purpose of the federal employment tax provisions of the Internal Revenue Code rather than as employees of taxpayer is erroneous as a matter of law. Indeed, the decision of the Supreme Court in United States v. Silk, 331 U.S. 704 (1947), clearly mandates a reversal of the District Court's judgment. No doubt, the question of whether there is the requisite employer-employee relationship is one which turns largely on an analysis of the facts in each individual case. But the facts in the instant case are so strikingly identical to the facts in the Silk case, insofar as the Supreme Court found them to be determinative factors bearing on employment status, as to make Silk controlling on the result to be reached here, and, as the Silk case clearly indicates, the

correctness of the lower court's application of the governing legal principles is reviewable on appeal as a question of law. Cf. Bishop v. United States, 476 F. 2d 977, 978 (C.A. 5, 1973).

United States v. Silk, supra, involved the status of coal unloaders and, secondly, of truck driver-owners for purposes of the federal employment tax provisions. The coal unloaders shoveled coal out of railroad cars into bins. They were paid by the ton. They came to the yard to work if and when they pleased. They were free to work for others at will. They provided their own tools. Some were regulars and some were "floaters." They were an integral part of that taxpayer's business. They had no opportunity for profit or loss except from their own labor. They were under the control of the taxpayer only to the extent necessary for the simple tasks involved. On these facts the Supreme Court reversed the decisions of two lower courts and held the coal unloaders to be employees for purposes of federal employment taxes, citing with approval Treasury Regulation 90, Art. 205, which was promulgated under the Social Security Act and which was substantially the same as the present regulations, cited above, regarding all three types of employment taxes. 331 U.S., p. 714. The Court stated pp. 716-718:

> Giving full consideration to the concurrence of the two lower courts in a contrary result, we cannot agree that the unloaders in the Silk case were independent contractors. They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act. They are of the group that the Social Security Act was intended to aid. Silk was in a position to exercise all necessary supervision over their simple tasks. [Footnotes omitted.]

Contrasted with the Court's determination that the coal unloaders were employees, is its determination that the truck driver-owners there involved (who, in Silk, hauled coal for the taxpayer using their own trucks, and who, in Greyvan Lines v. Harrison, 156 F. 2d 412 (C.A. 7, 1946) moved goods for the taxpayer's moving business, again, using their own trucks) were independent contractors rather than employees within the scope of the federal employment tax provisions. In making this distinction between the status of the coal unloaders and the status of the driver-owners, the Court noted that "the truckmen hire their own assistants, own their trucks, pay their own expenses, with minor exceptions, and depend upon their own initiative, judgment and energy for a large part of their success" (331 U.S. p. 716) and concluded (Id., p. 719):

> These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors. 6/

6/ Following the Court's decisions in Silk and Bartels v. Birmingham, 332 U.S. 126 (1947) (where the Court held that musicians were employees of the band leader who was in actual control of their performance rather than employees of the dance hall operators who engaged the bands for short term engagements notwithstanding the contract provisions which stated that the operator was the employer and that he had "complete control" over their services), the Treasury proposed new regulations which would have provided that the existence of an employer-employee relationship for the employment tax provisions might be determined without regard to the usual common law principles, as some of the broader language of the Silk and Bartels opinions seemed to suggest. Congress quickly responded to this proposal by adopting the definitions outlined above which provides that the usual common law principles should be determinative in this regard. See S. Rep. No. 1255, 80th Cong., 2d Sess. (2 U.S.C. Cong. Service (1948) 1752); United States v. Webb, Inc., 397 U.S. 179, 182-188 (1970). Although it is clear that the overriding purpose of Joint Resolution of June 14, 1948, c. 468, 62 Stat. 438, which made these changes in the statute, was to abort the proposed regulations and thereby prevent what Congress viewed as an administrative expansion of the coverage of the social security provisions, it is equally clear from the legislative history that Congress did not intend to overrule the Supreme Court's decisions in Silk and Bartels--indeed, those decisions were expressly approved as realistic applications of the common law tests as intended by Congress and as provided under the then existing Treasury Regulations which the Court had cited with approval. S. Rep. No. 1255, supra, pp. 13-17 (2 U.S.C. Cong. Service (1948), pp. 1764-1770)). (That a liberal, or "realistic," rather than a narrow or unduly restrictive application of the common law rules was intended was further reiterated at the time the coverage of the social security provisions were extended in 1950. See H. Conf. Rep. No. 2771, 81st Cong., 2d Sess., p. 104 (1950-2 Cum. Bull. 365, 372-373).) And, although there has been some dispute in this regard, this Court has specifically held that Congress intended that the new statutory definitions be applied in line with the Supreme Court's decisions in Silk and Bartels. Ringling Bros.-Barnum & Bailey Com. Shows v. Higgins, 189 F. 2d 865 (1951). Cf. Hoosier Home Improvement Co. v. United States, 350 F. 2d 640, 642 (C.A. 7, 1965).

Clearly, the car shuttlers in the instant case share few, if any, of these distinguishing characteristics of the driver-owners which the Court found significant in the Silk case. Indeed, the facts here almost exactly parallel those which led the Court to classify the coal unloaders in Silk as employees of the taxpayer. Here, like the coal unloaders in Silk, the car shuttlers were paid on a job unit basis. Here, as in Silk, the car shuttlers worked if and when they pleased, and were free to work for others at will. Like the coal unloaders in Silk, some of the shuttlers were "floaters" and some were more regular. Here, as in Silk, the shuttlers performed a service which was an integral part of the conduct of taxpayer's business. Here, unlike even the coal unloaders in Silk, the shuttlers provided none of their own tools, and unlike the driver-owers in Silk they were reimbursed for any expenses. Here, like coal unloaders and unlike the driver-owners, the shuttlers had no opportunity for profit or loss except from their own labor. And here, like the coal loaders, taxpayer was in a position to exercise the amount of control over the shuttlers necessary to supervise the tasks involved. Indeed, there is no significant detail in which the car shuttlers in this case are distinguishable from the coal unloaders in Silk. Since the Silk decision cannot be meaningfully distinguished, we submit that it is controlling here and that the decision below, concluding that the car shuttlers were not employees, was erroneous as a matter of law.

Indeed, the District Court's ultimate conclusion that the car shuttlers here involved should be classified as independent contractors cannot be squared with its own express findings regarding the various factors deemed significant in this respect by Silk, the Treasury Regulations and the other pertinent authorities. Clearly, under the long-standing Treasury Regulations, the most significant factor, which is generally of overriding importance, is presence or absence of the right to control the individuals involved in their performance of services as to both the result to be accomplished and also the details and means by which that result is accomplished. As the Supreme Court pointed out in Silk, only that amount of supervision necessary in relation to the tasks involved need be present. And as the District Court correctly observed (V-R. 903), it is the ultimate right to control and not the actual exercise of such supervision which is determinative. See, e.g., McGuire v. United States, 349 F. 2d 644, 646 (C.A. 9, 1965), where the court noted:

> The absence of need to control should not be confused with the absence of right to control. The right to control contemplated by the Regulations relevant here and the common law as an incident of employment requires only such supervision as the nature of the work requires.

See also Ringling Bros.-Barnum & Bailey Com. Shows v. Higgins, supra, p. 870, where this Court determined in connection with the status of circus performers that the court below had properly found an ultimate power of direction and control on the part of the circus management notwithstanding the fact, for example,

that "it could hardly be expected to direct the manner and means by which a human cannonball should be shot from a gun." Here, the requirements that a shuttler present a valid driver's license, and agree to deliver the vehicle at the time and place designated, plus the restrictions imposed upon the driver's use of the car and the requirement that the time and mileage be entered on the VTC constituted all the control necessary for taxpayer to supervise the car shuttling operation. As the District Court pointed out (V-R. 897), there could be no supervisors in the cars themselves for a manpower shortage is what led to the hiring of shuttlers in the first place. Indeed, taxpayer was in no better position to supervise the actual driving of the vehicles where the shuttling operation was performed by its regular full time employees. Thus, the District Court correctly found (V-R. 897) that taxpayer did have at least a limited right to control the shuttlers and that taxpayer could not support its contention that the shuttlers were independent contractors on the basis of this control factor.

Likewise, the court found that taxpayer's position was not supported with respect to the second important factor set forth in the regulations--i.e., the right to discharge. To be sure, the court did not accept the Government's contention that the right to refuse subsequent contracts from individuals with whose performance taxpayer may have been dissatisfied was necessarily the equivalent of the right to discharge.[7/]

7/ See Rev. Rul. 66-381, 1966-2 Cum. Bull. 449, relying, in this regard, on this Court's decision in the Ringling Bros., 189 F. 2d, p. 869.

By the same token, however, the court's conclusion that (V-R. 911) "under the circumstances of this case, no meaningful inference should be drawn with regard to the questionable ability, or inability, of AVIS to fire or discharge "shuttlers" militates against the position of the taxpayer, upon whom rests the burden of proof in this regard, both on the original refund claim and the Government's counterclaim for the amounts in issue remaining unpaid. See Lesser v. United States, 368 F. 2d 306, 310 (C.A. 2, 1966).

Notwithstanding its own findings that taxpayer had failed to support its position with respect to these two most critical factors, the District Court ruled in favor of the taxpayer, basing its determination that these car shuttlers should, nevertheless, be treated as independent contractors on a number of other factors which, at best, have been found material only where they have tended to be in accord with the inferences to be drawn from the more significant factors the presence or absence of the right to control or right to discharge, and which, at worst, have been found wholly irrelevant under such cases as Silk and Bartels, supra. For example, while the fact that the parties contractual descriptions of their relationship might lend support to the inference to be drawn from the more objective criteria, it is clear that they are of little significance where, as here, such self-serving descriptions fail to comport with the objective realities of the relationship. See, e.g., Bartels v. Birmingham, supra, and the Treasury Regulations quoted at page 15, supra. Likewise, although the relative permanency of a relationship might tend

to provide some support for the conclusion that the individuals concerned are employees (see, e.g., Ringling Bros., supra, p. 869), the Supreme Court in Silk specifically found that the fact that the individuals involved "did not work regularly is not significant" (331 U.S., p. 718) where the nature of the duties and the manner in which they were performed and supervised were characteristic of an employee-employer relationship. The Court implicitly reached the same conclusion with respect to the fact that, as here, the coal unloaders were free to "work for others at will." 331 U.S., p. 706.[8/] Nevertheless, contrary to the clear mandate of Silk, these are precisely the factors which the court below did emphasize in reaching its ultimate conclusion in this case. Indeed, the great emphasis it placed on these factors and also on the fact that taxpayer did not provide these car shuttlers the same employment benefits as it provided its regular, full time employees, would be warranted only if the federal employment tax provisions in issue were deemed inapplicable to temporary and part time employees, even though they perform for the taxpayer (during peak or overload periods) precisely the same function that it would ordinarily assign to its regular employees. (V-R. 901.) As Silk makes clear, such an application of the statutes involved cannot be justified.

8/ Conversely, the Court found that the truck drivers involved in the Greyvan Lines, Inc., supra, portion of the case were independent contractors even though the relationship of the parties was exclusive and relatively permanent.

Finally, the court also stressed the fact that in some instances, taxpayer dealt with head shuttlers who, in turn, selected individual shuttlers on their own. (V-R. 905-906.) But it is clear that this was the exception rather than the rule. Ordinarily, taxpayer dealt directly with each individual involved and there was no right under the VTC on the part of such shuttler to delegate to others the duties he had contracted to perform personally. It may well be that the record would support the conclusion that, in isolated cases, taxpayer established a different mode of dealing with its car shuttlers whereby it did, in fact, relinquish any right of control over the shuttling operation to persons who established themselves as independent businessmen who hired their own employees to serve as car shuttlers. But we submit that such exceptional arrangements cannot affect taxpayer's liability to withhold and pay employment taxes with respect to the great majority of car shuttlers, whom taxpayer engaged under totally different conditions. Clearly, those individuals cannot in any way be classified as independent "small businessmen" as the Court characterized the owner-drivers in Silk, supra, p. 719. They share, instead, all of the essential attributes of the coal unloaders there involved, both in the nature of their performance of services and in the manner of their compensation.

In conclusion, then, we submit that under the controlling authority of the Supreme Court's decision in United States v. Silk, supra, these car shuttlers are not independent contractors

as the court below erroneously concluded, but -- like the coal unloaders involved in Silk, should be classified as employees within the scope of the federal employment tax provisions here in issue.

CONCLUSION

The judgment of the District Court below should be reversed and this case remanded for further proceedings.[9/]

Respectfully submitted,

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MARCH, 1974.

9/ The lower court ordered a bifurcation of the trial of this case to first determine taxpayer's basic liability for the tax assessed, and reserved for later determination, if necessary, the exact amount of such liability. The case should, therefore, be remanded to determine the exact amount of taxpayer's liability in the event the judgment here appealed from is reversed.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 11th day of March, 1974, in an envelope, with postage prepaid, properly addressed to him as follows:

Robert Layton, Esquire
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APPENDIX

SUBTITLE C--EMPLOYMENT TAXES
CHAPTER 21--FEDERAL INSURANCE CONTRIBUTIONS ACT

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 3101 [as redesignated and amended by Sec. 321(b), Social Security Amendments of 1965, P.L. 89-97, Stat. 286]. RATE OF TAX.

(a) Old-Age, Survivors, and Disability Insurance.--In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))--

* * *

(b) Hospital Insurance.--In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b), * * *

* * *

SEC. 3102. DEDUCTION OF TAX FROM WAGES.

(a) Requirement.--The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

* * *

SEC. 3111. RATE OF TAX.

(a) [as redesignated and amended by Sec. 321(c), Social Security Amendments of 1965, P.L. 89-97, 79 Stat. 286] Old-Age, Survivors, and Disability Insurance.--In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))--

* * *

(b) Hospital Insurance.--In addition to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b), * * *

* * *

SEC. 3121. DEFINITIONS.

(a) Wages.--For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

* * *

(b) Employment.--For purposes of this chapter, the term "employment" means * * * any service, of whatever nature, performed after 1954 either (A) by an employee for the person employing him, * * *

* * *

(d) Employee.--For purposes of this chapter, the term "employee" means--

* * *

(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

* * *

CHAPTER 23--FEDERAL UNEMPLOYMENT TAX ACT

SEC. 3301 [as amended by Sec. 523(a)(1), (2), Social Security Amendments of 1960, P.L. 86-778, 74 Stat. 924]. RATE OF TAX.

There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar year 1961 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3.1 percent of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)) after December 31, 1938.

SEC. 3306. DEFINITIONS.

* * *

(b) Wages.--For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

* * *

(c) Employment.--For purposes of this chapter, the term "employment" means * * * any service, of whatever nature, performed after 1954 by an employee for the person employing him, * * *

* * *

(i) Employee.--For purposes of this chapter, the term "employee" includes an officer of a corporation, but such term does not include--

(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or

(2) any individual (except an officer of a corporation) who is not an employee under such common law rules.

CHAPTER 24--COLLECTION OF INCOME TAX AT SOURCE ON WAGES

SEC. 3401. DEFINITIONS.

(a) Wages.--For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; * * *

* * *

(c) Employee.--For purposes of this chapter, the term "employee" includes an officer, employee, or elected official of the United States, a State, Territory, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term "employee" also includes an officer of a corporation.

* * *

SEC. 3402 [as amended by Sec. 101(a), Tax Adjustment Act of 1966, P.L. 89-368, 80 Stat. 57]. 10/ INCOME TAX COLLECTED AT SOURCE.

(a) Requirement of Withholding.--Every employer making payment of wages shall deduct and withhold upon such wages (except as otherwise provided in this section) a tax determined in accordance with the following tables. * * *

* * *

10/ Section 3402, as amended, shall apply only with respect to remuneration paid after April 30, 1966. Section 3402 was previously amended by Section 302(a), Revenue Act of 1964, P.L. 88-272, 78 Stat. 19, which changed the rate of tax.

Treasury Regulations on Employment Taxes (26 C.F.R.):

§ 31.3121(d)-1 Who are employees.

* * *

(c) Common law employees. (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

§ 31.3306(i)-1 Who are employees.

(a) Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. (The word "employer" as used in this section only, notwithstanding the provisions of § 31.3306(a)-1, includes a person who employs one or more employees.)

(b) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(c) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

(d) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

* * *

§ 31.3401(c)-1 Employee.

(a) The term "employee" includes every individual performing services if the relationship between him and the person for whom he performs such services is the legal relationship of employer and employee. The term includes officers and employees, whether elected or appointed, of the United States, a State, Territory, Puerto Rico, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing.

(b) Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is not an employee.

(c) Generally, physicians, lawyers, dentists, veterinarians, contractors, sub-contractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are not employees.

(d) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

(e) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

* * *